EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT—SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR THE CRIME OF POSSESSING MORE THAN 650 GRAMS OF COCAINE IS NOT CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT—*Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

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I. INTRODUCTION

The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] Although the eighth amendment, without argument, proscribes tortuous or bizarre methods of punishment,[2] the precise scope of the "cruel and unusual punishment" clause has long remained undefined.[3] Despite its nebulous scope, the United States Supreme Court has interpreted this constitutional provision in a flexible manner,[4] and, at times, has

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[1] U.S. CONST. amend. VIII. The United States Supreme Court has held the eighth amendment fully applicable to the states through the due process clause of the fourteenth amendment. *See* Robinson v. California, 370 U.S. 660 (1962).

[2] *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . . [Cruel] implies something inhumane and barbarous."); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the eighth] amendment . . . ."). *See also* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947). *See generally* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 839 (1969) ("Judges and scholars alike have been content to accept . . . that the clause was originally designed to prohibit barbarous methods of punishment . . . ."); James, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871, 871 n.4 (1984).

[3] *See* Trop v. Dulles, 356 U.S. 86, 99 (1958) (plurality opinion) ("The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."). *See also* Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) ("The Cruel and Unusual Punishment Clause . . . is not susceptible to precise definition."); *Wilkerson*, 99 U.S. at 135-36 (The Court found it would be difficult "to define with exactness the extent of the . . . [cruel and unusual punishment] provision . . . .").

[4] *See* Gregg v. Georgia, 428 U.S. 153, 171 (1976) ("[T]he Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner."). *See also Trop*, 356 U.S. at 100-01 ("[The] scope [of the words of the eighth amendment] is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing

recognized the embodiment of a proportionality guarantee within the eighth amendment, requiring that the punishment imposed be proportional to the crime committed.[5] Recently, however, the Supreme Court has applied the proportionality principle somewhat inconsistently in the context of *non*capital cases.[6] Accordingly, lower courts have been left with substantial confusion and numerous questions concerning the application of the proportionality guarantee.[7] Moreover, the Court's

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society."); Weems v. United States, 217 U.S. 349, 378 (1910) ("The clause . . . [is] progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.").

[5] *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983) (A sentence of life imprisonment without parole was struck down as unconstitutional due to its severity in comparison to the offense of uttering a no account check.); Coker v. Georgia, 433 U.S. 584 (1977) (The death penalty is a disproportionate punishment for the crime of rape and, therefore, unconstitutional under the eighth amendment.); *Gregg*, 428 U.S. at 173 (Capital punishment is constitutionally proportionate to the deliberate taking of a human life.); *Trop*, 356 U.S. at 100 (recognizing the necessity of proportional punishments); *Weems*, 217 U.S. at 367 (The eighth amendment embodies a proportionality principle.).

[6] *See Solem*, 463 U.S. at 277 (Without overruling *Rummel* and *Davis*, the Court held that eighth amendment proportionality challenges to noncapital sentences are permissible; the Court then articulated a standard for determining proportionality.); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (reaffirming the *Rummel* decision by emphasizing the extraordinary circumstances that must exist to warrant a successful proportionality argument); Rummel v. Estelle, 445 U.S. 263 (1980) (The Supreme Court essentially rejected all proportionality challenges to terms of years under the eighth amendment except in rare, improbable cases.). *See also* Baker & Baldwin, *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985) ("Decisions like *Rummel* and *Solem* belie much constitutional simplicity.").

[7] *See* Baker & Baldwin, *supra* note 6, at 41-46. By distinguishing the challenged sentence in *Rummel* and *Davis* from that in *Solem*, the Supreme Court seems to have conclusively said only that Solem's life sentence without parole is disproportionate, and thus, has provided little guidance as to how to determine proportionality despite its establishment of a tripartite proportionality analysis. *Id.* at 46. Federal and state courts faced with determining the constitutionality of challenged sentences under the eighth amendment have, therefore, been torn between using *Solem's* criteria exclusively or adhering to the holdings in *Solem*, *Rummel* and *Davis* as coequals. *Id.* at 68. For examples of federal and state court decisions which have deemed the *Rummel*, *Davis*, and *Solem* holdings as equals see Williams v. State, 441 So. 2d 1157 (Fla. Dist. Ct. App. 1983); Hampton v. Commonwealth, 666 S.W.2d 737 (Ky. 1984); State v. Lathers, 444 So. 2d 96 (La. 1983); Sealy v. State, 451 So. 2d 213 (Miss. 1984); State v. Rider, 664 S.W.2d 617 (Mo. Ct. 1984). For cases which have used the *Solem* criteria exclusively, see Blues v. State, 447 So. 2d 1319 (Ala. Crim. App. 1984); State v. McNair, 141 Ariz. 475, 687 P.2d 1230 (1984); Thompson v. State, 280 Ark. 265, 658 S.W.2d 350 (1983); People v. Hernandez, 686 P.2d 1325 (Colo. 1984); Lamphere v. State, 348 N.W.2d 212 (Iowa 1984). *See also* Bradley, *Proportionality in Capital and Noncapital Sentencing: An Eighth*

most recent eighth amendment decision does little to clarify the convoluted status of the eighth amendment's proportionality principle.[8] In fact, the Supreme Court has further complicated the issue of proportionality.

This note will trace the development of the eighth amendment guarantee against disproportional punishments in Supreme Court precedent, with particular emphasis on the Court's recognition of the proportionality principle in noncapital cases.

On May 12, 1986 at 2:45 a.m., Police Officers Rix and Blackney observed Ronald Allen Harmelin's Blue Ford LTD leaving the parking lot of the Embassy Motel in Oak Park, Michigan.[9] The officers later sighted the car when it entered the motel parking lot at 4:00 a.m and again at 5:00 a.m.[10] Shortly thereafter, the officers observed the vehicle run a red light and, accordingly, effected a traffic stop of the car.[11] Harmelin exited the car and informed the officers that he was carrying a firearm for which he had a permit.[12] Noticing a bulge in Harmelin's coat pocket, the officers performed a pat-down search of Harmelin[13] and discovered a hard object in his chest pocket.[14] After identifying the contents of the container retrieved as marijuana, Harmelin was arrested for possession of an illegal substance.[15] Pursuant to the arrest, the officers conducted an extensive search which revealed three vials and ten clear plastic bags filled with white powder, assorted pills and capsules, drug paraphernalia, and a telephone paging device all within Harmelin's possession.[16] Thereafter, Harmelin's car was impounded.[17] An inventory search of the vehicle uncovered $2,900.00 in cash in a satchel

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Amendment Enigma, 23 IDAHO L. REV. 195, 196 (1986-87) (After *Solem*, the proportionality principle applied to both capital and noncapital decisions, but its scope seemed to depend upon the type of sentence being reviewed: the death penalty; life imprisonment with parole; life imprisonment without parole; or a lesser term of years.).

[8] Harmelin v. Michigan, 111 S. Ct. 2680 (1991).

[9] People v. Harmelin, 176 Mich. App. 524, 528, 440 N.W.2d 75, 77 (1989).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 528-29, 440 N.W.2d at 77.

[13] *Id.* at 529, 440 N.W.2d at 77.

[14] *Id.* at 533, 440 N.W.2d at 79.

[15] *Id.* at 529, 440 N.W.2d at 77.

[16] *Id.*

[17] *Id.* at 529, 440 N.W.2d at 77-78.

and two bags containing 672.5 grams of cocaine,[18] later valued at between $67,000.00 and $100,000.00.[19] In addition, the police uncovered Harmelin's address book which contained coded instructions seemingly related to drug trafficking.[20]

Petitioner Harmelin was subsequently convicted under Michigan law for possession of 672.5 grams of cocaine and possession of a firearm during the commission of a felony.[21] Harmelin was then sentenced to a mandatory term of life in prison without parole for the cocaine conviction and a two-year mandatory term of imprisonment for the felony-firearm conviction.[22] On appeal, the Court of Appeals of

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[18] *Id.* at 529, 440 N.W.2d at 78.

[19] Brief for Petitioner at 4, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272).

[20] People v. Harmelin, 434 Mich. 863, *Brief for Respondent in opposition to petition for cert.*, at iv, 59 U.S.L.W. 3018 (U.S. April 2, 1990) (No. 89-7272).

[21] People v. Harmelin, 176 Mich. App. 524, 527, 440 N.W.2d 75, 76 (1989).

[22] *Id.* at 527, 440 N.W.2d at 77. The statute under which Harmelin was convicted and sentenced for drug possession is MICH. COMP. LAWS ANN. § 333.7403 (West 1980 & Supp. 1990) which provides:

> (1) A person shall not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
> (2) A person who violates this section as to:
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv), and:
> (i) Which is an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.
> (ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.
> (iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.
> (iv) Which is an amount of less than 50 grams of any mixture containing that substance is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $2,000.00, or both.
> (b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.
> (c) Lysergic Acid, Diethylamide, peyote, mescaline, dimethyltryptamine,

Michigan initially reversed Harmelin's conviction,[23] concluding that the evidence supporting the conviction had been obtained in violation of the Michigan Constitution.[24] On its own motion, however, the appellate court subsequently vacated its judgment and retained the matter for reconsideration.[25] The Court of Appeals of Michigan ultimately affirmed the petitioner's conviction.[26] Thereafter, the Michigan Supreme Court denied the petitioner's leave to appeal.[27]

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psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
(d) Marihuana, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00 or both.

Id.

In addition, under MICH. COMP. LAWS ANN. § 333.7401(3) (West 1980 & Supp. 1990): "An individual subject to a mandatory term of imprisonment under subsection . . . 7403 (2)(a)(i), (ii), or (iii) shall not be eligible for probation, suspension of the sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life." *Id.*

[23] *Harmelin*, 176 Mich. App. at 527, 440 N.W.2d at 77. On appeal, Harmelin argued that the evidence against him was seized during an unlawful search and seizure, that he was deprived of effective assistance of counsel, and that his mandatory sentence of life imprisonment without parole constituted "cruel and unusual punishment" in violation of the eighth amendment to the United States Constitution. *Id.*

[24] *Id.* at 526, 440 N.W.2d at 76. The appellate court held that drivers, such as Harmelin, who are ordered out of their car after being stopped for a traffic violation, receive greater protection under the search-and-seizure provision of the Michigan Constitution than under the analogous federal provision in the fourth amendment to the United States Constitution. *Id.*

[25] *Id.* "Of concern [to the court] was the effect of a constitutional provision and its case-law precedent, uncited by the parties, on the issue of the propriety of a police officer's ordering a driver out of his car after having stopped the driver for a traffic violation." *Id.*

[26] *Id.* at 524-25, 440 N.W.2d at 75. The court of appeals held:

(1) State Constitution's search and seizure provision did not provide greater protection to drivers ordered out of car after being stopped for traffic violation than did Federal Constitution; (2) defendant was lawfully stopped for traffic violation and ordered out of car; (3) warrantless search of defendant's person and vehicle was lawful; and (4) mandatory sentence of life in prison was not out of proportion to seriousness of crime.

Id.

[27] People v. Harmelin, 434 Mich. 863, 440 N.W.2d 75 (1990).

The United States Supreme Court granted certiorari[28] solely to address the eighth amendment question presented by the petitioner; namely, whether the sentence of life imprisonment without the possibility of parole is grossly disproportionate to the gravity of his offense in violation of the eighth amendment's guarantee against cruel and unusual punishment.[29] Holding that the petitioner's sentence could not be considered disproportionate to the crime of possessing more than 650 grams of cocaine[30] and that a mandatory life sentence may be imposed absent a review of the mitigating circumstances surrounding the crime committed, the Supreme Court affirmed the decision of the Court of Appeals of Michigan.[31]

II. THE EVOLUTION OF THE EIGHTH AMENDMENT PROPORTIONALITY PRINCIPLE

A. THE GENESIS OF THE GUARANTEE

The earliest mention of an eighth amendment guarantee against disproportionate punishments is found in Justice Field's 1892 dissent in *O'Neil v. Vermont*.[32] In *O'Neil*, the petitioner was convicted of 307 counts of illegally selling "intoxicating liquor"[33] and subsequently fined

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[28] Harmelin v. Michigan, 110 S. Ct. 2559 (1990).

[29] Harmelin v. Michigan, 111 S. Ct. 2680, 2681 (1991). The petitioner further alleged that it is "cruel and unusual" to impose a mandatory sentence of life imprisonment with parole ineligibility without an examination of the mitigating circumstances surrounding the crime committed. *Id.*

[30] *See infra* notes 136-54 and accompanying text (discussing the Court's reasoning, as per Justice Scalia and Chief Justice Rehnquist, for concluding that the petitioner's sentence could not be considered constitutionally disproportional); *infra* notes 155-67 and accompanying text (discussing the concurring justices' reasoning for ultimately agreeing with the Court's judgment regarding the petitioner's proportionality claim).

[31] *Harmelin*, 111 S. Ct. at 2680.

[32] 144 U.S. 323 (1892). *See generally* Note, Solem v. Helm: *The Courts' Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590, 593 n.19 (1985); Baker & Baldwin, *supra* note 6, at 28.

[33] *Id.* at 325, 330. The Vermont statute under which the petitioner was convicted provided in pertinent part: "No person shall . . . manufacture, sell, furnish or give away, . . . spirituous or intoxicating liquor, or mixed liquor of which a part is spirituous or intoxicating, or malt liquors or lager beer; and the phrase 'intoxicating liquors' . . . shall be held to include such liquors and beer." *Id.* at 325 (quoting Revised Laws of Vermont of 1880 § 3800 of Ch. 169).

$6,638.72.[34] Additionally, the petitioner was to be confined to a house of corrections for 19,914 days of hard labor for failure to meet the payment deadline.[35] The United States Supreme Court refused to assess the validity of O'Neil's sentence under the eighth amendment, claiming that the issue had not been raised properly[36] and that the eighth amendment was not applicable to the states.[37] In a blistering dissent, however, Justice Field directly addressed the eighth amendment question.[38] The Justice declared that the eighth amendment forbids tortuous punishments, as well as "punishments which by their excessive length or severity are greatly disproportioned to the offense charged."[39] Justice Field further asserted that the essence of the eighth amendment is an inhibition "against that which is excessive."[40]

Although the *O'Neil* dissent discussed proportionality in punishments as early as 1892, the Supreme Court did not actually construe the cruel and unusual punishment clause to forbid disproportionate penalties until 18 years later.[41] In the landmark decision of *Weems v. United States,*[42] the Supreme Court declared for the first time that punishment may

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[34] *Id.* at 330. In accordance with section 3802 of the Vermont statute, the fine consisted of $20.00 for each count plus the costs of prosecution; moreover, prior to the payment deadline, the offender was committed to prison until the debt was satisfied. *Id.* at 326, 330 (citation omitted).

[35] *Id.*

[36] *Id.* at 331. O'Neil had seemingly raised the issue before the Supreme Court of Vermont that the statute under which he was sentenced was repugnant to both the federal and state Constitutions in that it allowed cruel and unusual punishment. *Id.* The United States Supreme Court, however, found that the issue was not assigned as error or suggested in the plaintiff's brief for the Court, and that the only question raised was whether the petitioner sold liquor in Vermont or New York. *Id.* at 331-32, 335.

[37] *Id.* at 331-32 (citing Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1866)). In *Pervear,* the Court dismissed the defendant's claim on the basis that the eighth amendment applied only to national, not state, legislation. *Pervear,* 72 U.S. at 479-80. Given the absence of a federal question, the *O'Neil* Court dismissed the defendant's writ of error for lack of jurisdiction. O'Neil v. Vermont, 144 U.S. 323, 335-37 (1892).

[38] *O'Neil,* 144 U.S. at 339 (Field, J., dissenting). The Justice indicated that the Court was indeed able to consider the petitioner's sentence under the eighth amendment. *Id.*

[39] *Id.* at 339-40 (Field, J., dissenting).

[40] *Id.* at 340 (Field, J., dissenting). Justice Field further maintained that "[f]ifty-four years' confinement at hard labor . . . is a punishment at the severity of which, considering the offences, it is hard to believe that any man of right feeling and heart can refrain from shuddering." *Id.*

[41] Weems v. United States, 217 U.S. 349 (1910).

[42] *Id.*

violate the eighth amendment for excessiveness.[43] The petitioner in *Weems*, convicted of falsifying a public document,[44] was fined and sentenced under Philippine law to 15 years of *cadena temporal*.[45] Essentially adopting Justice Field's dissent in *O'Neil*, the *Weems* Court announced, without hesitation, that "it is a precept of justice that punishment . . . be graduated and proportioned to [the] offense" committed.[46] Moreover, the Court insisted on a broad construction of the eighth amendment,[47] and characterized the cruel and unusual punishment clause as a progressive provision which would continue to acquire meaning over time.[48]

In assessing the constitutional validity of the petitioner's sentence, the majority measured the relationship between the petitioner's punishment and his crime.[49] The Court did so by examining the punishments imposed for other crimes in that jurisdiction[50] and the punishments imposed for the same crime in numerous other

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[43] *Id.* at 377.

[44] *Id.* at 358. Petitioner was convicted under section 300 of the Penal Code of the Philippine Islands. *Id.* (citation omitted).

[45] *Id.* at 358, 364-65. *Cadena temporal* was a form of imprisonment which included hard labor while bound in chains, and the loss of many basic civil rights. *Id.* at 364-65. Specifically, persons subjected to *cadena temporal* would be shackled at the ankles and wrists and would be deprived of marital and parental authority, property rights, and the right to vote and be elected for public office. *Id.* An individual would also be under surveillance for life after his or her release from prison. *Id.* at 364.

[46] *Id.* at 367.

[47] *Id.* at 373-74. The Court interpreted the cruel and unusual punishment clause of the Philippine Bill of Rights, which was taken verbatim from the eighth amendment of the United States Constitution, to have the same meaning. *Id.* at 367. The *Weems* Court explained that the eighth amendment was created in order to proscribe more than the punishments inflicted at the time the clause first arose in England. *Id.* at 373. The majority stressed that the eighth amendment must be "capable of wider application than the mischief which gave it birth." *Id.* Otherwise, the Court opined, "[r]ights declared in [its] words might be lost in reality." *Id.*

[48] *Id.* at 378. The *Weems* Court emphasized that the cruel and unusual punishment clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*

[49] *Id.* at 380-81.

[50] *Id.* The Court discovered that in the Philippines, similar crimes, as well as crimes of greater importance, were penalized less severely than the offense of falsifying a public document. *Id.*

jurisdictions.[51] Accordingly, the Court determined that the petitioner's penalty violated the eighth amendment since it was "cruel in its *excess* of imprisonment and that which accompanies and follows imprisonment."[52] With this holding, the *Weems* Court ultimately recognized an eighth amendment proportionality requirement and rejected the notion that the amendment only proscribes tortuous or barbarous modes of punishment.[53]

The eighth amendment proportionality requirement articulated by the Court in *Weems* lay dormant for almost half a century[54] until 1958 in *Trop v. Dulles.*[55] In *Trop*, the petitioner, a native-born American convicted of wartime desertion from the United States Army, was dishonorably discharged and stripped of his American citizenship.[56] The United States Supreme Court ultimately held that expatriation for the crime of wartime desertion constitutes cruel and unusual punishment within the meaning of the eighth amendment.[57] Determining the basic concept underlying the eighth amendment to be the dignity of man,[58] the *Trop* Court pointed out that the legislature must exercise its

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[51] *Id.* at 377-80. The majority found that the analogous United States federal offense carried a much lower penalty. *Id.* at 380 (citing Criminal Code, ch. 321, 35 Stat. 1088 (1909) (codified as amended at 18 U.S.C.A. ch. 1-15 (1969)).

[52] *Id.* at 377 (emphasis added). Although the Court recognized that the method of punishment was "unusual in its character," the Court's conclusion did not rest solely upon the nature of the penalty. *Id.* Indeed, the Supreme Court stated: "[i]ts punishments come under the condemnation of the bill of rights, both on account of their *degree* and kind." *Id.* (emphasis added).

[53] *Id.*

[54] *See* Graham v. West Virginia, 224 U.S. 616 (1912) (The United States Supreme Court upheld a recidivist statute which imposed a mandatory life sentence on a three-time convicted felon and made no mention of *Weems.*). *See also* Badders v. United States, 240 U.S. 391 (1916). *See generally* Baker & Baldwin, *supra* note 6, at 30.

[55] 336 U.S. 86 (1958) (plurality opinion).

[56] *Id.* at 87-89. Petitioner was deprived of his citizenship under the provisions of section 401(g) of the Nationality Act of 1940 which was based on a Civil War statute providing that a convicted deserter would lose his nationality. *Id.* at 88-90 (citation omitted).

[57] *Id.* at 93-104.

[58] *Id.* at 100. The *Trop* Court emphasized that although the scope of the eighth amendment is unclear, the basic policy of its words are "firmly established in the Anglo-American tradition of criminal justice." *Id.* at 99-100. In support of this proposition, the Court pointed to the amendment's origins in the English Declaration of Rights of 1689 and the Magna Carta. *Id.* at 100.

punishing authority in view of civilized standards.[59] The Supreme Court further maintained that the validity of a particular penalty depends upon "the enormity of the crime."[60] The *Trop* plurality, therefore, affirmed the *Weems* Court's proposition that the eighth amendment mandates that there be a degree of proportionality between the sentence imposed and the offense committed.[61] The *Trop* Court also confirmed the flexible scope of the eighth amendment by declaring that the amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society."[62] Finally, in setting aside the petitioner's sentence, the Supreme Court adhered to the *Weems* standard and assessed the petitioner's penalty in relation to the practices of other civilized nations.[63]

B. PROPORTIONALITY IN CAPITAL SENTENCING

Following the Court's bold announcements of an eighth amendment proportionality guarantee in *Weems* and *Trop*, the Supreme Court began to extensively discuss the proportionality principle and its application in the context of capital punishment.[64] In the seminal death penalty case

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[59] *Id.*

[60] *Id.* The plurality stressed, however, that any punishment, other than a fine, imprisonment or execution—which is not a "traditional penalty"—is constitutionally suspect. *Id.*

[61] *Id.* For a complete discussion of the *Weems* decision, see *supra* notes 41-53 and accompanying text.

[62] Trop v. Dulles, 336 U.S. 86, 100-01 (1958) (plurality opinion). The Supreme Court in *Trop* explained that the "words of the Amendment are not precise, and that their scope is not static." *Id.*

[63] *Id.* at 102-03. The *Trop* plurality utilized an interjurisdictional analysis similar to that used by the Court in *Weems*. *Id.* The Court looked at the different penalties imposed by the international community for the crime of wartime desertion and found that "civilized nations of the world are in virtual unanimity" in condemning denationalization as a punishment. *Id.* at 102. *See* Note, *supra* note 32, at 597 (The *Trop* Court clearly thought the punishment was unusual and probably found it excessive as well. It cannot be said conclusively, however, that the Court's ultimate invalidation of the petitioner's sentence was based on the excessiveness of the punishment.).

[64] These discussions began with the Court's 1972 decision in *Furman v. Georgia*, 408 U.S. 238 (1972), wherein the Supreme Court considered the constitutionality of imposing the death penalty in two cases of rape and one case of murder under a capital sentencing scheme that was prevalent in many states. For a more thorough discussion of the *Furman* decision, see Bradley, *supra* note 7, at 200-08; Note, *supra* note 32, at 599-602; Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After* Furman v. Georgia, 25 STAN L. REV. 62 (1972).

of *Gregg v. Georgia*,[65] the Supreme Court stressed the necessity of maintaining a degree of proportionality in punishments.[66] The petitioner in *Gregg*, sentenced to death after being convicted on two counts of armed robbery and two counts of murder,[67] challenged the constitutionality of his execution, alleging that capital punishment constituted "cruel and unusual punishment" within the meaning of the eighth amendment.[68] Emphasizing the flexible and dynamic nature of the eighth amendment,[69] the Court declared that the amendment

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Although a deeply divided Court failed to resolve the issue of whether the death penalty was a per se violation of the eighth amendment, the *Furman* decision is relevant in that several members of the Supreme Court acknowledged the general principle that the eighth amendment proscribes grossly disproportionate punishments. *Furman*, 408 U.S. at 279-80 (Brennan, J., concurring) ("Severe punishment must not be excessive . . . [and a] determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime . . . ."); *id.* at 312 (White, J., concurring) (The imposition of a penalty "with only marginal contributions to any discernible social or public purposes . . . [and] with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."); *id.* at 331-32 (Marshall, J., concurring) ("[O]ne of the primary functions of the cruel and unusual punishment clause is to prevent excessive or unnecessary penalties . . . . The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'" (citations omitted)).

[65] 428 U.S. 153 (1976). For a further discussion of *Gregg*, see Bedau, Gregg v. Georgia *and the "New" Death Penalty*, 4 CRIM. JUST. ETHICS 3 (1985); Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Rabkin, *Justice and Judicial Hand-Wringing: The Death Penalty Since* Gregg, 4 CRIM. JUST. ETHICS 18 (1985); Note, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U.L. REV. 835 (1981).

[66] *Gregg*, 428 U.S. at 173.

[67] *Id.* at 160. Gregg was sentenced to death for the murders after the jury found: (1) "the offense of murder was committed while the offender was engaged in the commission of two other capital felonies"—the armed robberies of the victims; and (2) "the offender committed the offense of murder for the purpose of receiving [the victims'] money and [their] automobile"—two of the aggravating circumstances necessary for the imposition of the death penalty under Georgia's statutory capital sentencing procedures. *Id.* at 161. *See* GA. CODE ANN. § 26-3102 (1977) (capital offenses; jury verdict and sentencing); *id.* § 26-2302 (recommendation to mercy); *id.* § 27-2534 (mitigating and aggravating circumstances; death penalty); *id.* § 27-2537 (review of death sentence).

[68] *Gregg*, 428 U.S. at 153.

[69] *Id.* at 169-73. The *Gregg* Court explained:

> [T]he prohibition embodied in the Eighth Amendment [has not been confined] to *barbarous* methods that were generally outlawed in the 18th century.
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> . . . .
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> It is clear . . . that the Eighth Amendment has not been regarded as a static

forbids penalties which are excessive.[70] Accordingly, the *Gregg* Court established an objective standard for applying the proportionality principle.[71] The Court announced that a penalty will be unconstitutionally excessive under the eighth amendment if it "involve[s] the unnecessary and wanton infliction of pain" or "is grossly [disproportionate] to the severity of the crime" committed.[72] The Supreme Court concluded, however, that the unique sentence of death[73] is proportional to the deliberate taking of a human life under the eighth amendment because an extreme sanction is suitable for an extreme

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> concept. . . . Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.

Id. at 171-73 (emphasis in original).

[70] *Id.* at 173.

[71] *Id.*

[72] *Id.* The Court did stress, however, that the judiciary's role in applying eighth amendment requirements is limited by the deference which must be afforded to legislative penal judgments. *Id.* at 174-76. The *Gregg* Court further emphasized that "[the judiciary] may not require the legislature to select the least severe penalty so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Id.* at 175.

[73] *Id.* at 187. The *Gregg* Court distinguished capital punishment as different from all other forms of punishment, stressing its "uniqueness" in severity and irrevocability. *Id.* *See* Furman v. Georgia, 408 U.S. 238, 286-87 (1972) (Brennan, J., concurring). In *Furman*, Justice Brennan stated:

> [D]eath is the ultimate sanction. . . . No other punishment has been so continuously restricted . . . .
>
> The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of its physical and mental suffering.

Id. (citation omitted). *See also id.* at 306 (Stewart, J., concurring). In his concurrence, Justice Stewart stated:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id.

crime.[74]

One year later, the Supreme Court again firmly embraced the proportionality principle by striking down a capital sentence for the rape of an adult woman as violative of the eighth amendment.[75] In *Coker v. Georgia*,[76] the petitioner—found guilty of rape, armed robbery, kidnapping, and motor vehicle theft[77]—was sentenced to death on the rape conviction.[78] Assessing the constitutionality of the petitioner's sentence in view of *Gregg's* "excessiveness" test,[79] the Court examined the penalties imposed upon like rapists in other jurisdictions,[80] as well as the penalties that had been imposed upon rapists in the State of Georgia.[81] Despite the seriousness of the crime, the Court stressed the unique aspects of capital punishment and determined death to be an excessive penalty for a rape which did not result in the deliberate taking

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[74] Gregg v. Georgia, 428 U.S. 153, 187 (1976). Accordingly, the Court held that the death penalty is not violative of the eighth amendment in all cases and upheld the petitioner's capital sentence. *Id.* at 187, 207.

[75] Coker v. Georgia, 433 U.S. 584 (1977). For a further discussion of *Coker*, see Bedau, *supra* note 65; Comment, *Evolutions of the Eighth Amendment and Standards for the Imposition of the Death Penalty*, 28 DE PAUL L. REV. 351 (1979).

[76] 433 U.S. 584 (1977).

[77] *Id.* at 587. Petitioner committed these crimes after he escaped from prison, where he was serving time for murder, rape, kidnapping and aggravated assault. *Id.*

[78] *Id.* at 584, 587. In sentencing the petitioner, the jury found that the rape was committed by a person with prior capital felony convictions, and that the rape was committed in the course of committing another capital felony, armed robbery. *Id.* at 587-91. These findings established two of the aggravating circumstances necessary to impose the death penalty under Georgia's statutory procedures. *Id. See supra* note 67 (citing Georgia's capital sentencing statutes).

[79] *Coker*, 433 U.S. at 592. Relying on *Gregg*, the Court announced that punishment is unconstitutionally excessive if "(1) [it] makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering; or (2) [it] is grossly out of proportion to the severity of the crime." *Id.*

[80] *Id.* at 593-96. The *Coker* Court discovered that Georgia was the only jurisdiction in the United States which, at that time, inflicted the death penalty for the rape of an adult woman. *Id.* at 595-96. The Court indicated that two states authorize the death penalty for rape, but only where an adult has been convicted of raping a child. *Id.* at 596.

[81] *Id.* at 596-97. The Supreme Court referred to the sentencing decisions made by Georgian juries and found only six rapists had been sentenced to the death since 1973. *Id.* The Court, therefore, concluded that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence [for rape]." *Id.* at 597.

of a human life.[82]

C. TRILOGY OF THE CURRENT PROPORTIONALITY PRINCIPLE IN NONCAPITAL CASES[83]

Following the *Coker* decision, the Supreme Court established the first of three precedents involving eighth amendment challenges to noncapital sentences which, until *Harmelin*, established the current status of the proportionality principle.[84] In *Rummel v. Estelle*,[85] the petitioner was convicted of his third nonviolent felony for obtaining $120.75 under false pretenses.[86] Sentenced to a mandatory sentence of life imprisonment under a Texas recidivist statute,[87] the petitioner appealed, claiming that his sentence was disproportionate to the crimes he had committed in violation of the eighth amendment cruel and unusual punishment clause.[88] A sharply divided Court upheld the petitioner's mandatory life sentence, stating that the imposition of such punishment for a recidivist's third felony conviction did not violate the eighth amendment.[89]

Acknowledging that the Court had occasionally construed the eighth

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[82] *Id.* at 598. The *Coker* Court held that death is a disproportionate penalty for the crime of raping an adult woman. *Id.* at 592 n.4 & 597.

[83] *See generally* Baker & Baldwin, *supra* note 6, at 32-33.

[84] Rummel v. Estelle, 445 U.S. 263 (1980). The *Rummel* Court discussed the eighth amendment proportionality guarantee in the noncapital context for the first time in nearly a century. *See id. See generally* Note, State v. Davis: *A Proportionality Challenge to Maryland's Recidivist Statute*, 48 MD. L. REV. 520, 526-27 (1989).

[85] 445 U.S. 263 (1980). For a more thorough discussion of the *Rummel* decision see Dressler, *Substantive Criminal Law Through the Looking Glass of* Rummel v. Estelle: *Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063 (1981).

[86] *Rummel*, 445 U.S. at 265-66. William James Rummel was convicted of his first felony of fraudulent use of a credit card to obtain $80 worth of goods and services in 1964. *Id.* at 265. In 1969, he was found guilty of a second felony of passing a forged check in the amount of $28.36. *Id.* at 265-66.

[87] *Id.* at 266. The Texas recidivist statute provides in pertinent part: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.* at 264 (quoting TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974 & Supp. 1988) (current version at TEX. PENAL CODE ANN. § 12.42(d) (Supp. 1991))). Thus, the statute was triggered by the petitioner's third felony conviction. *Id.* at 266.

[88] *Id.* at 267.

[89] *Id.* at 285.

amendment to proscribe grossly disproportionate sentences,[90] the Court, in an opinion by Justice Rehnquist, declared that the proportionality guarantee is not applicable to a mere term of years.[91] The *Rummel* Court further asserted that the proportionality principle has been limited to capital cases in recent years.[92] Emphasizing that the death penalty is unquestionably unique and different in kind from all other criminal punishments,[93] the majority explained that the Court's capital jurisprudence is of limited assistance in determining the constitutionality of a prison sentence.[94] The Supreme Court further stressed that the finding of disproportionality in *Weems* fails to sustain a generalized proportionality principle given the set of peculiar facts involved in that earlier case.[95] Accordingly, the Court asserted that decisions regarding the length of felony prison sentences are within the province of the legislature,[96] stressing the judiciary's inability to objectively differentiate

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[90] *Id.* at 271. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (The Court announced that the enormity of a crime will be relevant in assessing the constitutionality of a particular punishment.); Weems v. United States, 217 U.S. 349, 366-67 (1910) (The Supreme Court declared that under the eighth amendment, a punishment must be graduated to the crime committed.). *See also* Ingraham v. Wright, 430 U.S. 651, 667 (1977).

[91] Rummel v. Estelle, 445 U.S. 263, 272-77 (1980).

[92] *Id.* at 272. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the death penalty is disproportionate to the crime of rape); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (holding that capital punishment is constitutionally proportionate to the crime of murder). *See also* Furman v. Georgia, 408 U.S. 238, 414 (1972) (Powell, J., dissenting).

[93] *Rummel*, 445 U.S. at 272. For a discussion of the uniqueness of the capital sentence, see *supra* note 73.

[94] *Rummel*, 445 U.S. at 272.

[95] *Id.* at 273-74. The Court stated that the facts in *Weems* are extremely bizarre given the trivial offense committed and the extensive length of the minimum term and extraordinary accessories of the punishment. *Id.* (citing Weems v. United States, 217 U.S. 349, 366, 372, 377, 380 (1910)). Thus, the *Rummel* Court indicated that neither *Weems*, nor the Court's capital decisions, can be relied upon to support a proportionality guarantee or to assess the constitutionality of a noncapital sentence. *Id.*

[96] *Id.* at 274. The Court articulated that the principles of federalism demand that substantial deference be afforded to legislative penal decisions. *Id.* Moreover, the *Rummel* Court stated that "one could argue without contradiction by any decision of this Court that for crimes concededly classified or classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.*

between two terms of years.[97] Nonetheless, the *Rummel* Court did not completely preclude successful proportionality challenges to noncapital sentences.[98] Indeed, the Supreme Court clearly conceded that in certain extreme cases, a prison sentence may be so grossly disproportionate to the offense committed as to trigger eighth amendment proportionality protection.[99]

Two years later, the Supreme Court confronted the second decision of the trilogy.[100] The Court, in *Hutto v. Davis,*[101] rejected an eighth amendment challenge to a forty-year prison term for the possession and distribution of nine ounces of marijuana[102] and upheld the sentence as

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[97] *Id.* at 275. The Supreme Court maintained that "Eighth Amendment judgments should not be . . . merely the subjective views of [the] individual Judges[, but instead] should be informed by objective factors to the maximum possible extent." *Id.* at 274-75 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)). Rejecting the petitioner's suggestion of an interjurisdictional analysis as an objective standard, the Court criticized the standard as too complex and unconvincing since federalism allows states to treat like crimes differently. *Id.* at 275, 281-82.

[98] *Id.* at 274 n.11.

[99] *Id.* The *Rummel* Court stated: "[t]his is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment." *Id.*

In a strong dissent, Justice Powell, joined by Justices Brennan, Marshall and Stevens, argued that the eighth amendment proportionality guarantee is applicable in all contexts. *Id.* at 288 (Powell, J., dissenting). The dissent asserted that the eighth amendment's history recognizes a generalized proportionality guarantee inherent in the cruel and unusual punishment clause. *Id.* at 288-93 (Powell, J., dissenting). Justice Powell, therefore, maintained that the Supreme Court has a constitutional obligation to assess the severity of a challenged noncapital sentence in relation to the gravity of the offense committed. *Id.* at 293 (Powell, J., dissenting). Accordingly, the dissent provided three objective factors to aid in a proportionality determination which included: "(i) the nature of the offense; (ii) the sentence imposed for the commission of the same crime in other jurisdictions; and (iii) the sentence imposed upon other criminals in other jurisdictions." *Id.* at 295 (Powell, J., dissenting) (citations omitted).

[100] Hutto v. Davis, 454 U.S. 370 (1982) (per curiam). *See* Baker & Baldwin, *supra* note 6, at 36 ("[T]he Court seemed to make a special effort to reaffirm its holding in *Rummel.*"). For a further discussion of *Davis*, see Comment, *The Eight Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQ. L. REV. 434 (1982).

[101] 454 U.S. 370 (1982) (per curiam).

[102] *Id.* at 375. Davis was convicted of possession with the intent to distribute approximately nine ounces of marijuana worth $200.00. *Id.* at 370-71. The jury imposed a $10,000.00 fine and a 20-year prison term on each count, with the sentences to run consecutively. *Id.* at 371. Davis petitioned for a writ of habeas corpus, claiming that his sentence was grossly disproportionate to the crime of possessing nine ounces of marijuana and, therefore, violative of the eighth amendment prohibition against cruel and unusual punishments. *Id.*

constitutional under the eighth amendment.[103] The *Davis* Court reiterated that judicial review of legislatively mandated prison sentences should be exceedingly rare.[104] The Court then pointed to the "bright line" identified in *Rummel* which distinguishes the death penalty from all other punishments in order to demonstrate the absence of a generalized eighth amendment proportionality principle.[105] Stressing the objective criteria necessary for an eighth amendment proportionality review, the *Davis* Court asserted that a comparison between two terms of years invariably leads to a subjective determination since the penalties are distinguishable merely in duration.[106] The Supreme Court again admitted, however, that in certain situations a proportionality review of noncapital cases may be acceptable.[107]

Despite the holdings in *Rummel* and *Davis,* a proportionality principle for noncapital sentences survived, as was evidenced the following year by the Court's decision in *Solem v. Helm*.[108] The

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[103] *Id.* at 375.

[104] *Id.* at 374. The Supreme Court maintained that "federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment' . . . and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'" *Id.* (quoting Rummel v. Estelle, 445 U.S. 263, 274, 272 (1980)).

[105] *Id.* at 373. The *Davis* Court stressed that the death penalty, by its very nature, differs from all other penalties and, therefore, the proportionality guarantee applicable to capital sentences cannot be extended to noncapital sentences. *Id. See supra* note 93 and accompanying text (discussing the *Rummel* Court's statements concerning the uniqueness of the death penalty).

[106] Hutto v. Davis, 454 U.S. 370, 373 (1982) (per curiam). Thus, the Court determined that an eighth amendment proportionality review of a term of years is inappropriate. *Id.*

[107] *Id.* at 374 n.3. The Court referred to the overtime parking footnote in *Rummel. Id; see supra* notes 98-99.

The dissent in *Davis*—comprised of Justices Brennan, Marshall and Stevens—strongly asserted that the application of the *Rummel* decision should be limited to certain situations where a severe sentence, which *"might otherwise constitute a disproportionate prison sentence,"* has been imposed upon a recidivist as a result of an "overwhelming state interest [to deter] habitual offenders." *Davis,* 454 U.S. at 383 (Brennan, J., dissenting) (emphasis in original). The dissent maintained that this case was one of those rare examples of a term of years referred to by the *Rummel* Court which is constitutionally disproportionate, as seen by an interjurisdictional comparison with other sentences imposed upon drug offenders. *Id.* at 384-86 (Brennan, J., dissenting). Justice Brennan, therefore, admonished the Court for seriously and improperly expanding the holding in *Rummel. Id.* at 382-83 (Brennan, J., dissenting).

[108] 463 U.S. 277 (1983). For a more elaborate discussion of the *Solem* decision, see Note, *supra* note 32. *See also* Baker & Baldwin, *supra* note 6, at 38 ("A proportionality principle of amorphous dimension survived both decisions.").

petitioner in *Solem* had already been convicted of six felonies[109] when he was found guilty of a seventh felony for uttering a $100 "no account" check.[110] For this seventh conviction, the court sentenced the petitioner to life imprisonment without parole under a South Dakota recidivist statute.[111] Declaring the petitioner's sentence to be disproportionally severe to the offense committed, the Supreme Court overturned the petitioner's sentence.[112] The *Solem* Court extensively examined the history of the eighth amendment[113] and found no support for the proposition that the eighth amendment proportionality guarantee is not applicable to felony prison sentences.[114] Although recognizing the great deference which must be afforded to legislative penal

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[109] *Solem*, 463 U.S. at 279-80. In 1964, 1966 and 1969, Helm was found guilty of third degree burglary. *Id.* at 279. In 1972, he was found guilty of obtaining money under false pretenses. *Id.* at 279-80. Helm was convicted of grand larceny in 1973. *Id.* at 280. In 1975, he was found guilty of a third offense of driving while intoxicated. *Id.*

[110] *Id.* at 281. Under South Dakota law, "[a]ny person who . . . passes a check drawn on a financial institution knowing at the time of such passing that he . . . does not have an account with such financial institution, is guilty of a Class 5 felony." *Id.* at 281 n.5 (quoting S.D. CODIFIED LAWS § 22-41-1.2 (1979) (current version at S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1988)).

[111] *Id.* at 282. The South Dakota recidivist statute under which Helm was sentenced provided in pertinent part: "[w]hen a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." *Id.* at 281 (quoting S.D. CODIFIED LAWS § 22-7-8 (1979) (amended 1981) (current version at S.D. CODIFIED LAWS ANN. § 22-7-8 (1988)). "The maximum penalty for a *Class 1* felony was life imprisonment and a $25,000 fine." *Id.* at 281-82 (citing S.D. COMP. LAWS § 22-6-1(2) (1967 ed., Supp. 1978) (now codified as S.D. CODIFIED LAWS § 22-6-1(3) (Supp. 1982)) (current version at S.D. CODIFIED LAWS § 22-6-1(3) (1988)) (emphasis in original)). South Dakota law expressly states that parole is not available. *Id.* at 282 (quoting S.D. CODIFIED LAWS § 24-15-4 (1979) (current version at S.D. CODIFIED LAWS § 24-15-4 (1979)).

[112] *Solem*, 463 U.S. at 303.

[113] *Id.* at 284-88. Referring to its expression in the Magna Carta of 1215 and the first statute of Westminster, the Court determined that the proportionality principle is "deeply rooted and frequently repeated in common-law jurisprudence." *Id.* at 284. Further finding the principle of proportionality repeated in the language of the English Bill of Rights, the Court stated that by incorporating the language of the English provision verbatim into the eighth amendment, the framers adopted a proportionality principle as well. *Id.* at 285-86. Moreover, the *Solem* Court reviewed the history of the eighth amendment guarantee in Supreme Court precedent, noting that the Court has indeed recognized a proportionality guarantee embodied in the eighth amendment for nearly a century. *Id.* at 286-88.

[114] *Id.* at 288 & n.14.

judgments,[115] the Court boldly announced an eighth amendment proportionality guarantee for all criminal penalties.[116] Moreover, in response to the dissent's accusation that the majority had blatantly disregarded recent precedent,[117] the *Solem* Court limited the holding in *Rummel* to analogous fact patterns and distinguished it from the instant case.[118]

The *Solem* Court then set forth objective criteria to guide courts in assessing the constitutional proportionality of a given sentence under the eighth amendment.[119] The majority suggested that courts should review three factors when determining proportionality;[120] namely, the gravity of the offense and the severity of the penalty;[121] the sentences imposed upon individuals who had committed other crimes in the same jurisdiction;[122] and "the sentences imposed for commission of the same crime in other jurisdictions."[123] Employing these three factors, the *Solem* Court ultimately concluded that the petitioner's sentence was unconstitutionally cruel and unusual.[124]

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[115] *Id.* at 290. The *Solem* Court stated that such deference may make proportionality review of sentences rare, but stressed that such a review is still permissible and quite necessary. *Id.*

[116] *Id.* at 289-90. The Court recognized the unique quality of the death penalty, but asserted that capital jurisprudence does not differentiate between sentences of imprisonment and sentences of death in its generalized statements regarding a proportionality requirement in punishments. *Id.* The *Solem* Court concluded, therefore, that terms of years are not excluded from the scope of the eighth amendment guarantee. *Id. See also* Dressler, *supra* note 85, at 1095.

[117] *See infra* note 124.

[118] Solem v. Helm, 463 U.S. 277, 303 n.32 (1983). According to the *Solem* majority, the Court in *Rummel* rejected one specific proportionality challenge to one particular sentence and held only that successful proportionality challenges are generally rare. *Id.* The *Solem* Court further indicated that *Rummel* offered no guidance to decide such rare cases. *Id.* The Court distinguished Helm's sentence from Rummel's sentence based on the critical difference that Rummel's sentence included the possibility of parole while Helm's sentence did not. *Id.*

[119] *Id.* at 290-92.

[120] *Id.* at 290.

[121] *Id.* at 290-91.

[122] *Id.* at 291.

[123] *Id.* at 291-92.

[124] *Id.* at 296-300. Four dissenters, including Justices Burger, White, Rehnquist and O'Connor, admonished the *Solem* Court for disregarding well-established case law and distorting the concept of proportionality. *Id.* at 304 (Burger, J., dissenting). The dissent harshly rejected the tripartite proportionality analysis set forth by the majority,

As this contradictory trilogy suggests, the United States Supreme Court has, within the last ten years, created enormous confusion regarding the applicability and scope of the eighth amendment proportionality principle in the noncapital context. It is against this inconsistent interpretation of the eighth amendment that the Supreme Court granted certiorari to address whether a sentence of life imprisonment without the possibility of parole for the crime of possessing 672.5 grams of cocaine, is "cruel and unusual" in violation of the eighth amendment.

III. CONTINUED CONFUSION IN THE COURT: *HARMELIN v. MICHIGAN*

Justice Scalia, writing for a sharply divided Court,[125] rejected the petitioner's contention that his mandatory sentence of life imprisonment without the possibility of parole is cruel and unusual punishment violative of the eighth amendment.[126] The Court stated that the petitioner's "required mitigation" claim[127] lacked support in the history of the eighth amendment.[128] The nation's consistent use of mandatory sentencing in the past, the Justice articulated, indicates that a severe mandatory sentence, although possibly cruel, is "not unusual in the

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emphasizing the Supreme Court's previous rejection of the test in both *Rummel* and *Davis*. *Id.* at 308-10 (Burger, J., dissenting) (citing Rummel v. Estelle, 445 U.S. 263, 275-76, 280-82 (1980); Davis v. Hutto, 454 U.S. 370, 295-303 (1982)). The dissent further argued that the length of a prison term is a matter of legislative discretion. *Id.* at 310 (Burger, J., dissenting) (citing *Rummel*, 445 U.S. at 290).

[125] Harmelin v. Michigan, 111 S. Ct. 2680 (1991). Justice Scalia delivered the opinion for the Court with respect to Part V, in which Chief Justice Rehnquist joined. *Id.* at 2701. Justice Scalia, joined by Chief Justice Rehnquist, delivered Parts I-IV of the opinion. *Id.* at 2684. Justices Kennedy, O'Connor and Souter, concurred in Part V and concurred in the judgment in Parts I-IV of the opinion. *Id.* at 2702 (Kennedy, J., concurring). Justice White filed a dissenting opinion, in which Justices Blackmun and Stevens joined. *Id.* at 2709 (White, J., dissenting). Justice Marshall filed a dissenting opinion. *Id.* at 2719 (Marshall, J., dissenting). Justice Stevens filed a separate dissent and was joined by Justice Blackmun. *Id.* (Stevens, J., dissenting).

[126] *Id.* at 2701.

[127] *Id.* The "required mitigation" claim refers to the petitioner's contention that his sentence is cruel and unusual because the sentencing judge imposed such a severe sentence without considering the mitigating circumstances of his crime. *Id.*

[128] *Id.*

constitutional sense."[129] Justice Scalia stated, therefore, that the mandatory nature of the petitioner's sentence alone does not make his sentence "cruel and unusual" within the meaning of the eighth amendment.[130]

The Court did acknowledge that the petitioner's claim finds some support in the Court's death penalty jurisprudence which created and developed the "individualized capital sentencing doctrine."[131] Justice Scalia pointed out, however, that the Supreme Court's capital decisions have consistently emphasized the qualitative difference between death and all other forms of punishment[132] and, accordingly, indicated the absence of a comparable individualized sentencing requirement outside the capital context.[133] Thus, although the penalty of life imprisonment

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[129] *Id.* The *Harmelin* Court pointed out that the nation's first Penal Code contained provisions for mandatory death sentences. *Id.* Justice Scalia further indicated that "[mandatory death sentences] were also common in the several States—both at the time of the founding and throughout the 19th century." *Id. See* Woodson v. North Carolina, 428 U.S. 280, 289-90 (1976) (discussion of the history of mandatory death penalty statutes in the United States, beginning at the time the eighth amendment was adopted).

[130] Harmelin v. Michigan, 111 S. Ct. 2680, 2701 (1991). *See* Chapman v. United States, 111 S. Ct. 1919, 1928-29 (1991).

[131] *Harmelin*, 111 S. Ct. at 2701. According to Justice Scalia, "a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that punishment is *appropriate*." *Id.* (emphasis in original). *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original)). *See also* Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (death penalty invalidated after advisory jury and sentencing judge were precluded from considering nonstatutory mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104, 110-16 (1982) (capital sentence struck down because it was imposed without a consideration of the mitigating circumstances of petitioner's unhappy childhood and emotional disturbance); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (The Court stated that a constitutional shortcoming of the North Carolina death penalty statute was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.").

[132] *Harmelin*, 111 S. Ct. at 2702 (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). *See supra* note 73 (discussion of the unique aspects of the death penalty).

[133] *Harmelin*, 111 S. Ct. at 2702. *See Eddings*, 455 U.S. at 110 ("The [particularized sentencing] rule . . . is [one] product of a considerable history reflecting the law's effort to develop a system of capital punishment . . . humane and sensible to the uniqueness of the individual."); *id.* at 117-18 (O'Connor, J., concurring) ("Because sentences of death are *qualitatively different* from prison sentences, this Court has gone to

without parole may be considered unique as the second most severe sentence permitted under law, the *Harmelin* Court concluded that the penalty remains distinguishable from the "unique" sentence of death.[134] The Supreme Court, therefore, refused to extend the "individualized sentencing doctrine" beyond the capital context.[135]

Justice Scalia, joined solely by Chief Justice Rehnquist,[136] also addressed the petitioner's proportionality claim.[137] Recognizing that the five-to-four decision by the Court in *Solem* did not constitute an "expression of clear and well accepted constitutional law,"[138] Justice

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extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee . . . that the sentence was not imposed out of whim, passion, prejudice, or mistake." (emphasis in original)); *Lockett*, 438 U.S. at 605 ("When the choice is between life and death, [the] risk [that the punishment will be imposed in spite of factors that call for a less severe penalty] is unacceptable . . . with the commands of the Eighth and Fourteenth Amendments."); *Woodson*, 428 U.S. at 305 (Because of the qualitative difference between death and the sentence of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); Furman v. Georgia, 408 U.S 238, 306 (1972) (Stewart, J., concurring) ("[D]eath differs from all other forms of criminal punishment . . . *in kind*." (emphasis in original)).

[134] *Harmelin*, 111 S. Ct. at 2702.

[135] *Id.*

[136] *Id.* at 2684. Justice Scalia delivered Parts I-IV of the opinion in which only Chief Justice Rehnquist joined, although the concurrence agreed with the ultimate judgment reached in Parts I-IV. *Id.* at 2680.

[137] *Id.* at 2684.

[138] *Id.* at 2686. Justice Scalia explained that "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents [that are] recent and in apparent tension with other decisions." *Id.* (emphasis in original). *See* Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991); Mitchell v. W. T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring); Smith v. Allwright, 321 U.S. 649, 665 & n.10 (1944); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting). The Justice indicated that *Solem* is such a precedent. Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991). The Justice pointed out that the Court has recognized that the lengths of noncapital sentences are generally a matter of legislative prerogative. *Id.* at 2685-86 (citing Rummel v. Estelle, 445 U.S. 263, 274 (1980)). Although the Supreme Court has acknowledged the possibility of implementing a proportionality principle in extreme noncapital cases, the Justice explained, the Court has stressed that "successful proportionality challenges outside the context of capital punishment 'have been exceedingly rare.'" *Id.* at 2685 (quoting *Rummel*, 445 U.S. at 272). *See also Rummel*, 445 U.S. at 274 n.11 ("if a legislature made overtime parking a felony punishable by life imprisonment . . . "). Justice Scalia further asserted that the inference that gross disproportionality will establish a successful eighth amendment challenge to a noncapital sentence has been permitted only due to misdescriptions and expansions of the Court's language in *Rummel*. *Harmelin*, 111 S. Ct. at 2685-86. Moreover, the Justice stressed

Scalia began his analysis by engaging in an extensive examination of the background of the eighth amendment in order to determine whether the amendment indeed proscribes disproportionate punishments.[139]

Justice Scalia initially identified the English Declaration of Rights of 1689 as the antecedent to the eighth amendment cruel and unusual punishment clause,[140] but then firmly rejected the *Solem* Court's contention that the English provision embodied a proportionality guarantee.[141] The Justice further pointed out that the meaning

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that the Court rejected the tripartite proportionality analysis set forth in *Solem* in both *Rummel* and *Davis*. *Id.* at 2684, 2685 (citing Hutto v. Davis, 454 U.S. 370, 373-74 & n.2 (1982); *Rummel*, 445 U.S. at 281 n.27).

[139] *Harmelin*, 111 S. Ct. at 2686. The Justice particularly focused upon the understanding of the amendment before the end of the nineteenth century. *Id.*

[140] *Id.* The "cruell and unusuall Punishments" provision of the English Declaration of Rights of 1689 provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted" and was incorporated essentially verbatim into the eighth amendment. Bill of Rights, 1 Wm. & Mary, Sess. 2, ch. 2 (1689).

[141] *Harmelin*, 111 S. Ct. at 2688. Based on this contention, the *Solem* Court asserted that the eighth amendment necessarily embodies a proportionality principle as well. *Id.* *See supra* notes 108-24 and accompanying text (discussing the *Solem* decision).

Justice Scalia stated that historical evidence suggests it was the arbitrary exercise of sentencing power by Lord Chief Justice Jeffreys of the King's Bench in administering justice, particularly his invention of penalties not authorized by common law or statute, which led to the establishment of the "cruell and unusuall Punishments" provision of the Declaration of Rights of 1689. *Harmelin*, 111 S. Ct. at 2688 (citing Granucci, *supra* note 2, at 855-56; 4 W. BLACKSTONE, COMMENTARIES, 369-70 (1783); L. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, 92-93 (1981); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 490 (1883); 1 J. CHITTY, CRIMINAL LAW 712 (5th Am. ed. 1847)). The Justice further declared that the only recorded contemporaneous interpretation of the provision focuses upon the arbitrary and illegal use of sentencing power by Jeffreys' King's Bench, rather than on the disproportionate nature of punishments imposed. *Harmelin*, 111 S. Ct. at 2688. Moreover, the prologue of the Declaration of Rights, as well as contemporaneous discussions regarding the Declaration, the Justice noted, state that a punishment was objectionable if it was "'out of [the Judges'] Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.'" *Id.* at 2690 (citing 2 T. MACAULAY, HISTORY OF ENGLAND 204 (1899)). Therefore, the Justice declared that the circumstances surrounding the enactment of the English provision and the contemporaneous understanding of the English guarantee confirm that the provision was formulated solely to diminish the arbitrary and illegal use of sentencing power by the King's Bench. *Harmelin*, 111 S. Ct. at 2686, 2691. Additionally, the Justice stressed that the English framers were familiar with the concept of proportionality. *Id.* at 2687. Thus, their decision to use the terminology "cruell and unusuall," rather than to expressly prohibit disproportional punishments, Justice Scalia argued, further evinces that the provision was not meant to embody a proportionality guarantee. *Id.*

attributed to the provision in England is irrelevant.[142] The ultimate question, according to the Justice, is what the cruel and unusual punishment clause meant to the Americans who adopted it as a component of the Bill of Rights.[143] The Justice opined that Americans intended the cruel and unusual punishment clause to act solely as a check upon the legislature's ability to authorize particular methods or modes of punishment.[144] The debates of the state ratifying conventions that prompted the Bill of Rights, the actions of the First Congress which proposed it, and especially the early judicial constructions of the amendment,[145] the Justice stated, all demonstrate that the provision was directed at prohibiting cruel methods of punishment, rather than at proscribing disproportionate penalties.[146] Justice Scalia concluded,

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[142] *Id.* at 2691. Justice Scalia implied that the notion of blind incorporation is not acceptable and further noted that a "direct transplant" of the English meaning would not have been possible given the status of American constitutionalism at that time. *Id.*

[143] *Id.*

[144] *Id. See, e.g.*, Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment . . . ."); *In re* Kemmler, 136 U.S. 436, 446-47 (1890) (The language of the amendment was intended particularly to operate upon legislative power.). *See also* United States v. Collins, 25 F. Cas. 545 (C.C. R.I. 1854) (No. 14,836).

[145] Harmelin v. Michigan, 111 S. Ct. 2680, 2693-95 (1991). Justice Scalia characterized the early judicial constructions of the eighth amendment and its state counterparts as "[p]erhaps the most persuasive evidence of what [the phrase] *cruel and unusual* meant . . . ." *Id.* at 2695 (emphasis in original). *See, e.g.*, Barker v. People, 20 Johns. 457 (N.Y. Sup. Ct. 1823), *aff'd*, 3 Cow. 686 (N.Y. 1824) (Assuming the eighth amendment to be applicable to states, the court considered the proportionality of the challenged punishment with respect to the crime committed irrelevant.); Aldridge v. Commonwealth, 45 Va. 447, 449-50 (1824) (Interpreting the Virginia cruel and unusual punishment clause, the court emphasized that the provision merely applies to modes of punishment.). *Accord* Whitten v. Georgia, 47 Ga. 297, 301 (1872); Hobbs v. State, 133 Ind. 404, 408-10, 32 N.E. 1019, 1020-21 (1893); State v. White, 44 Kan. 514, 520-21, 25 P. 33, 34-35 (1890); Commonwealth v. Hitchings, 71 Mass. (1 Gray) 482, 486 (1855); People v. Morris, 80 Mich. 634, 638, 45 N.W. 591, 592 (1890); Cummins v. People, 42 Mich. 142, 143-44, 3 N.W. 305 (1879); State v. Williams, 77 Mo. 310, 312-13 (1883); Garcia v. Territory, 1 N.M. (Gild., E.W.S. ed.) 415, 417-19 (1869); State v. Hogan, 63 Ohio St. 202, 218, 58 N.E. 572, 575 (1900).

[146] *Harmelin*, 111 S. Ct. at 2693-95. Justice Scalia also emphasized that, since several states had included proportionality principles in their constitutions prior to the adoption of the eighth amendment, the framers were certainly aware of the concept of proportionality. *Id.* at 2692. Accordingly, the Justice reasoned, had the framers desired to include a proportionality guarantee in the eighth amendment, they knew the language necessary to effectuate their intent and also that the phrase "cruel and unusual" would hardly be adequate. *Id.*

therefore, that the eighth amendment does not contain a proportionality guarantee[147] and, accordingly, that "*Solem* was simply wrong."[148]

Justice Scalia further rejected the *Solem* Court's assertion that a proportionality guarantee evolved from the Supreme Court's twentieth century jurisprudence regarding the eighth amendment.[149] The Justice conceded that the *Weems* decision[150] may support the notion that the eighth amendment bars punishments that are "excessive in relation to the crime committed."[151] The Justice asserted, however, that it is very difficult "to view *Weems* as announcing a constitutional requirement of proportionality, given that it did not produce a decision implementing such a requirement . . . for six decades."[152] Justice Scalia further

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[147] *Id.* at 2681, 2684-701.

[148] *Id.* at 2686. Moreover, Justice Scalia pointed out that the absence of adequate textual and historical standards, which are absolutely necessary to determine constitutional disproportionality, reinforces the necessity of overruling *Solem*. *Id.* at 2682, 2696-99. The Justice stated that the tripartite proportionality analysis set forth in *Solem* demonstrates that the application of a proportionality principle invites the imposition of subjective values. *Id.* at 2697. Given the "enormous variation in opinion as to what constitutes a serious offense," Justice Scalia contended, the first and second factors of the *Solem* test fail for lack of an objective standard of gravity. *Id.* at 2697-98. The Justice further stated that the third *Solem* factor is completely irrelevant to an eighth amendment analysis since "[t]raditional notions of federalism entitle States to treat like situations, [particularly like offenses], differently in light of local needs, concerns, and social conditions." *Id.* at 2682, 2698-99. Conversely, Justice Scalia noted, "there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are *cruel and unusual*." *Id.* at 2696, 2698-99 (emphasis in original).

[149] *Id.* at 2699. Justice Scalia recognized that "[the Supreme Court's] 20th-century jurisprudence has not remained entirely in accord with the proposition that there is no proportionality requirement in the Eighth Amendment." *Id.* However, the Justice refused to accept that "it departed to the extent that *Solem* suggests." *Id.* *See supra* notes 108-24 and accompanying text (discussing the *Solem* decision).

[150] *See supra* notes 41-53 and accompanying text (discussing the *Weems* decision).

[151] Harmelin v. Michigan, 111 S. Ct. 2680, 2700 (1991). The Justice acknowledged that *Solem* identified *Weems* as "the 'leading case' . . . exemplifying the 'general principle of proportionality.'" *Id.* at 2685 (quoting Solem v. Helm, 463 U.S. 277, 287, 288 (1983)).

[152] *Id.* *See* Graham v. West Virginia, 224 U.S. 616 (1912) (The Court made no mention of *Weems* despite the petitioner's reliance on the decision.). *See also* Badders v. United States, 240 U.S. 391 (1916). Justice Scalia further maintained that a proportionality requirement was not unqualifiedly applied to criminal penalties until 185 years after the amendment was adopted. *Harmelin*, 111 S. Ct. at 2700-01. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (The death penalty is disproportionate to the crime of felony murder where the participant lacked the intent to kill.); Coker v. Georgia, 433 U.S. 584 (1977) (The imposition of the death penalty for rape of an adult woman is unconstitutional because of its disproportionality.).

stressed that the Court's utilization of a proportionality principle in capital cases is not a "generalizable aspect of Eighth Amendment law" since the Court has consistently recognized that "death is different" and has, therefore, "imposed protections [in the capital context] that the Constitution nowhere else provides."[153] Thus, given the absence of a proportionality guarantee in the eighth amendment, Justice Scalia concluded that Harmelin's sentence could not be considered constitutionally disproportional.[154]

Justice Kennedy, concurring in the opinion,[155] departed from Justice Scalia's approach to the eighth amendment proportionality analysis.[156] Justice Kennedy asserted that the Court's eighth amendment decisions *have* recognized the existence of a narrow proportionality principle for eighty years,[157] and that stare decisis mandates the Court's adherence to this principle.[158] The Justice then pointed out that a close analysis of the Court's eighth amendment jurisprudence yields common principles[159] "that give content to the

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[153] *Harmelin*, 111 S. Ct. at 2701 (citing Rummel v. Estelle, 445 U.S. 263 (1980)). *See, e.g.*, Turner v. Murray, 476 U.S. 28, 36-37 (1986) (Capital sentencing procedures cannot be infected by the risk of racial prejudice.); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (Since death is different from all other punishments, a review of mitigating circumstances is required prior to imposing the death penalty.); Beck v. Alabama, 447 U.S. 625, 637 (1980) ("[A] significant constitutional difference [exists] between the death penalty and lesser punishments" given the fact that in the former a person's life is at stake.).

[154] *Harmelin*, 111 S. Ct. at 2681.

[155] *Id.* at 2702 (Kennedy, J., concurring). Justice Kennedy, joined by Justices O'Connor and Souter, concurred in Part V and in the ultimate judgment reached in Parts I-IV of the Court's opinion. *Id.*

[156] *Id.*

[157] *Id.* Justice Kennedy pointed out that the Supreme Court first interpreted the eighth amendment as proscribing "greatly disproportional" sentences in *Weems*. *Id.* (quoting Weems v. United States, 217 U.S. 349, 371 (1910)). Since *Weems*, the Justice noted, the Supreme Court has applied the proportionality principle in both capital and noncapital cases alike. *Id.* at 2702-03 (Kennedy, J., concurring). *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam); Rummel v. Estelle, 445 U.S. 263 (1980) .

[158] Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (1991) (Kennedy, J., concurring).

[159] *Id.* at 2703 (Kennedy, J., concurring). According to Justice Kennedy, the first of these principles is the primacy of the legislature in fixing prison terms for crimes which involve substantive penological judgment. *Id.* at 2703-04 (Kennedy, J., concurring). The second principle described by the Justice is that "the Eighth Amendment does not mandate [the] adoption of any one penological theory." *Id.* at 2704 (Kennedy, J., concurring). Third, the concurrence posited, our federal structure necessarily creates

uses and limits of proportionality"[160] and which require that the petitioner's sentence be upheld.[161] Emphasizing the devastating effects of the drug epidemic in this country, the Justice reasoned that the Michigan Legislature clearly had a rational basis for concluding that possession of more than 650 grams of cocaine poses a severe enough societal threat to warrant a sentence of life imprisonment without parole.[162]

Justice Kennedy further asserted that, given the severity of the petitioner's crime, an intra- and inter-jurisdictional analysis[163] of the petitioner's sentence is not required.[164] The Justice explained that the Court's proportionality decisions indicate that a comparative analysis within and between jurisdictions is only necessary on those rare occasions

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"marked divergences both in underlying theories of sentencing and in the lengths of prescribed prison terms . . . ." *Id.* The fourth principle, Justice Kennedy recognized, is that a proportionality review must be guided "by 'objective factors to the maximum possible extent.'" *Id.* at 2704-05 (Kennedy, J., concurring) (citations omitted). Finally, the Justice declared that "the Eighth Amendment does not require strict proportionality between crime and sentence [but rather] forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 2705 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 288).

[160] *Id.* at 2703 (Kennedy, J., concurring).

[161] *Id.* at 2706-07 (Kennedy, J., concurring).

[162] *Id.* at 2706 (Kennedy, J., concurring). Justice Kennedy concluded that Harmelin's sentence, although severe, is not grossly disproportionate to the crime of possessing more than 650 grams of cocaine. *Id.* Justice Kennedy rejected the petitioner's contention that his offense was nonviolent and victimless. *Id.* In addition to the pernicious effects that illegal drugs have on individuals who consume them, the Justice recognized:

> [D]rugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as a part of the drug business or culture.

Id. (citation omitted).

[163] *Id.* at 2707 (Kennedy, J., concurring). These analyses refer to the second and third factors of *Solem's* tripartite proportionality analysis. *Id. See supra* notes 119-23 and accompanying text (discussing the *Solem* factors).

[164] Harmelin v. Michigan, 111 S. Ct. 2680, 2707 (1991) (Kennedy, J., concurring). Justice Kennedy stated that the *Solem* Court did not mandate the use of all three factors, stressing that "'no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.'" *Id.* (quoting Solem v. Helm, 463 U.S. 277, 291 n.17 (1983)). *See also* Solem, 463 U.S. at 291-92 (Comparative analyses of the sentence imposed *may* be helpful or useful to courts.) (emphasis in original).

where "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[165]

Finally, in rejecting the petitioner's argument that individualized sentencing is required in noncapital cases where a severe penalty is imposed, Justice Kennedy maintained that such a proposition lacks support in both the Court's capital and noncapital precedents.[166] Justice Kennedy, therefore, concurred in the Court's judgment that the petitioner's sentence of life imprisonment without parole for the possession of 672.5 grams of cocaine in no way violates the eighth amendment.[167]

In a vigorous dissent,[168] Justice White rejected Justice Scalia's conclusion that the eighth amendment does not require proportional punishments except in those cases which involve a sentence of death.[169] Although the language of the eighth amendment does not explicitly refer to proportionality in punishments, Justice White argued, the amendment's proscription of "excessive" fines reasonably permits the conclusion that it is "cruel and unusual" to impose punishments which are grossly disproportionate.[170] Moreover, the Justice asserted that, regardless of whether the language of the eighth amendment actually bears such a construction, the Court has repeatedly and undeniably construed the cruel and unusual punishment clause to embody a

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[165] *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring). The Justice asserted that in *Solem* and *Weems*, the Court performed comparative analyses only after determining that the sentences imposed were grossly disproportionate to the crime committed. *Id.* (citing *Solem*, 463 U.S. at 298-300; Weems v. United States, 217 U.S. 349, 377-81 (1910)). Justice Kennedy then contrasted that approach to the path taken in *Rummel* and *Davis*, where the Supreme Court did not perform comparative analyses given the initial determination that the sentences were not grossly disproportionate to the offenses committed. *Id.*

[166] *Id.* Justice Kennedy stressed that the Court's capital punishment jurisprudence rejects any requirement of individualized sentencing in noncapital cases. *Id.* The Justice further stated that mandatory sentencing comports with the Court's noncapital proportionality decisions. *Id.* at 2707-08 (Kennedy, J., concurring).

[167] *Id.* at 2709 (Kennedy, J., concurring).

[168] *Id.* (White, J., dissenting). Justice White authored a dissenting opinion in which Justices Blackmun and Stevens joined. *Id.*

[169] *Id.* *See supra* notes 136-54 and accompanying text for Justice Scalia's reasoning.

[170] Harmelin v. Michigan, 111 S. Ct. 2680, 2709 (1991) (White, J., dissenting). Justice White criticized Justice Scalia's "weak" opposition to this construction of the eighth amendment. *Id.* at 2710 (White, J., dissenting).

proportionality guarantee.[171] Justice White, therefore, maintained that Justice Scalia's position is completely irreconcilable with the Supreme Court's eighth amendment jurisprudence.[172]

Justice White further declared that "dangers lurk in Justice Scalia's analysis."[173] Justice White cautioned that, absent a proportionality guarantee, no mechanism will exist for confronting extreme situations where a proportionality principle is undeniably necessary.[174] The Justice also warned that if the eighth amendment is deemed to prohibit solely modes or methods of punishment, much of the Court's death penalty jurisprudence "will rest on quicksand."[175]

The dissenting Justice continued by addressing the validity of the

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[171] *Id.* at 2710-11 (White, J., dissenting). Justice White validated this point by referring to the Court's numerous eighth amendment decisions. *Id.* (citing Solem v. Helm, 463 U.S. 277 (1983) (invalidating a prison sentence based on its disproportionality to the crime committed); Enmund v. Florida, 458 U.S. 782 (1982) (invalidating the death penalty based on its undue severity in relation to the crime committed); Coker v. Georgia, 433 U.S. 584, 592 (1977) (The eighth amendment bars grossly disproportionate punishments as well as tortuous punishments.); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Punishment that is grossly disproportionate is unconstitutional under the eighth amendment.); Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment . . . be graduated or proportioned.")). The Justice also pointed out that the Court has never suggested that the inclusion of a proportionality guarantee is impermissible. *Harmelin,* 111 S. Ct. at 2711 (White, J., dissenting) (citing Rummel v. Estelle, 445 U.S. 263 (1980)).

[172] *Id.* at 2711 (White, J., dissenting). Justice White stressed that the Supreme Court's capital jurisprudence, which announces a generalized eighth amendment proportionality component, "reject[s] Justice Scalia's notion that the Amendment bars only cruel and unusual modes or methods of punishment." *Id.* at 2712 (White, J., dissenting). The dissenting Justice noted that "[u]nder [Justice Scalia's] view, capital punishment—a mode of punishment—would either be completely barred or left to the discretion of the legislature." *Id.* The Justice asserted, however, that quite the contrary is true since capital punishment is considered appropriate in certain cases and not in others. *Id.* Justice White asserted that Justice Scalia also failed to explain why the phrase "cruel and unusual" can guarantee against disproportionality solely in capital cases. *Id.*

[173] *Id.* at 2714 (White, J., dissenting).

[174] *Id.* Without a proportionality principle, Justice White maintained, any prison sentence, regardless of its severity, will be beyond review under the eighth amendment and totally within the legislature's discretion. *Id.* at 2712 (White, J., dissenting).

[175] *Id.* at 2714 (White, J., dissenting). Justice White again pointed out that capital penalty jurisprudence is quite inconsistent with Justice Scalia's position. *Id.* The Court's decisions, the dissenting Justice argued, "do not outlaw death as a mode or method of punishment, but instead put limits on its application." *Id. See supra* note 172.

tripartite proportionality analysis set forth in *Solem*.[176] The Justice noted that the Court evaluates punishments under the eighth amendment in view of "evolving standards of decency"[177] that are based upon "objective factors to the maximum possible extent."[178] Contrary to Justice Scalia's assertion,[179] Justice White argued that such objective factors indeed form the basis of the *Solem* proportionality test.[180] Justice White emphasized, however, that Justice Kennedy's abandonment of the second and third factors of the test "makes any attempt at an objective proportionality analysis futile."[181] Additionally, the Justice argued that such an elimination directly conflicts with *Solem*,[182] as well as numerous other Court decisions which have recognized the necessity of an inter- and intra-jurisdictional comparison

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[176] Harmelin v. Michigan, 111 S. Ct. 2680, 2712-14 (1991) (White, J., dissenting). For a discussion of the *Solem* tripartite analysis, see *supra* notes 119-23 and accompanying text.

[177] *Harmelin*, 111 S. Ct. at 2712 (White, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). *See* Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (quoting *Trop*, 356 U.S. at 101).

[178] *Harmelin*, 111 S. Ct. at 2712 (White, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

[179] *See supra* note 148.

[180] *Harmelin*, 111 S. Ct at 2712-13 (White, J., dissenting). Justice White asserted that the courts have been able to apply the *Solem* test to "'noncapital sentences with a high degree of sensitivity to the principles of federalism and state autonomy.'" *Id.* at 2713 (White, J., dissenting) (quoting Rummel v. Estelle, 445 U.S. 263, 306 (1980)). The Justice further proffered that "[the] analysis affords 'substantial deference to the broad authority' [of the legislature]." *Id.* (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)). Moreover, given the mere handful of sentences that have been deemed unconstitutional as a result of applying the *Solem* test, the Justice asserted, it is obvious that these courts have not "baldly substituted their subjective views for those of the legislature." *Id.* The Justice further indicated that the *Solem* analysis is applicable to sentences imposed in the exercise of judicial discretion, as well as to legislatively mandated sentences which are not per se legal or usual in the constitutional sense. *Id.*

[181] *Id.* at 2715 (White, J., dissenting). Justice White stated that *Solem's* first prong only requires a consideration of "two discrete factors: the gravity of the offense and the severity of the punishment." *Id.* According to the Justice, "[a] court is not expected to consider the interaction of these two elements . . . " to determine unconstitutional disproportionality, since an attempt to do so would amount to an assessment based on the individual views of the judges. *Id.*

[182] *Id.* at 2714 (White, J., dissenting). Justice White pointed out that "[*Solem*] made clear that 'no one factor will be dispositive in a given case,' and 'no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment,' '[b]ut a combination of objective factors can make such analysis possible.'" *Id.* (quoting *Solem*, 463 U.S. at 291 n.17).

of punishment and crime in determining disproportionality.[183] Accordingly, Justice White concluded that no justification exists for overruling or limiting the *Solem* proportionality analysis.[184]

Justice White then proceeded to assess the constitutionality of the petitioner's sentence in view of the *Solem* factors.[185] The Justice noted that the petitioner's sentence is the most severe penalty permitted under Michigan law[186] and that the absolute magnitude of the petitioner's crime was not exceptionally serious.[187] Justice White asserted that the petitioner had been treated the same or more severely than Michigan criminals who had committed far more serious offenses.[188] The Justice further recognized that no other jurisdiction punishes a first-time drug offender for the possession of 672.5 grams of cocaine as severely as Michigan.[189] Justice White, therefore, concluded that the gravity of the

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[183] *Id.* at 2714-15. The Justice pointed out that "numerous cases have recognized that a proper proportionality analysis must include the consideration of such objective factors as 'the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made.'" *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 788 (1982)). Moreover, the Justice explained, the Court's occasional use of these analyses *after* a consideration of the crime's severity does not diminish their relevance. *Id.* at 2715 (White, J., dissenting).

[184] *Id.* at 2716 (White, J., dissenting).

[185] *Id.* *See supra* notes 119-23 and accompanying text (discussion of the *Solem* factors).

[186] Harmelin v. Michigan, 111 S. Ct. 2680, 2716 (1991) (White, J., dissenting). The Justice explained that Michigan does not permit the death penalty. *Id.*

[187] *Id.* at 2717 (White, J., dissenting). Although drugs are, without a doubt, a serious societal problem, the Justice stated, the ripple effect that drugs have on the society often are not the direct consequence of drug possession. *Id.* The Justice explained that "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." *Id.* at 2716 (White, J., dissenting) (citing *Enmund*, 458 U.S. at 801). Therefore, the Justice declared, the petitioner's sentence cannot be justified based on the subsidiary effects of drug use. *Id.*

[188] *Id.* at 2718 (White, J., dissenting). The Justice recognized that life without parole in Michigan "is reserved for three crimes: first-degree murder; manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics; and possession of 650 grams or more of narcotics." *Id.* (citing MICH. COMP. LAWS ANN. § 750.316 (1991)). Moreover, Justice White declared, other crimes which are directed at people "do not carry such a harsh mandatory sentence." *Id.* *See* MICH. COMP. LAWS ANN. § 750.317 (second-degree murder); *id.* § 750.520(b) (rape); *id.* § 750.529 (armed robbery).

[189] *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting). The Justice pointed out that Alabama imposes a mandatory prison sentence of life without parole for a first-time drug offender but only when the offender possesses ten or more kilograms of cocaine. *Id.* (citing ALA. CODE § 13A-12-231(2)(d) (Supp. 1990)). The Justice also stressed that

petitioner's crime did not warrant a sentence of life imprisonment without parole.[190] Accordingly, the Justice announced that the petitioner's sentence amounted to cruel and unusual punishment under the eighth amendment.[191]

Justice Marshall, in a brief but spirited dissent, agreed with Justice White's main conclusion that the eighth amendment embodies a general proportionality guarantee.[192] Contrary to Justice White's opinion, however, Justice Marshall adhered to his view that capital punishment constitutes cruel and unusual punishment in *all* instances.[193] Moreover, Justice Marshall asserted that, given the uniqueness of the sentence of death,[194] capital punishment, "where not proscribed, [is] especially restricted" by a comparative proportionality review.[195]

In a separate dissenting opinion,[196] Justice Stevens asserted that the penalty of life imprisonment without parole does not fall into "the same category as capital punishment."[197] Justice Stevens stressed that capital punishment is "'unique' because of 'it's absolute renunciation of all that is embodied in our concept of humanity.'"[198] Nonetheless, since the petitioner's sentence does not satisfy any meaningful requirement of proportionality, Justice Stevens concluded that Harmelin's sentence is as

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"[e]ven under Federal Sentencing Guidelines . . . petitioner's sentence would barely exceed ten years." *Id.* (citing United States Sentencing Commission Guidelines Manual, § 2D1.1 (1990)).

[190] *Id.* at 2719 (White, J., dissenting).

[191] *Id.*

[192] *Id.* (Marshall, J., dissenting). *See supra* notes 168-91 and accompanying text (discussion of Justice White's contentions).

[193] Harmelin v. Michigan, 111 S. Ct. 2680, 2719 (1991) (Marshall, J., dissenting). *See* Gregg v. Georgia, 428 U.S. 153, 231-32 (1976) (Marshall, J., dissenting) ("The death penalty is excessive . . . and the American people . . . reject it as morally unacceptable."). *See also* Furman v. Georgia, 408 U.S. 238, 331-32, 342-59, 360-69 (1972) (Marshall, J., concurring).

[194] *Harmelin*, 111 S. Ct. at 2719 (Marshall, J., dissenting) (citing *Gregg*, 428 U.S. at 188).

[195] *Id.* Justice Marshall emphasized, however, that his view does not conflict with Justice White's ultimate conclusion that the eighth amendment imposes a general proportionality requirement. *Id.*

[196] *Id.* (Stevens, J., dissenting). Justice Stevens authored a separate dissenting opinion, in which Justice Blackmun joined, but emphasized that he agreed wholeheartedly with Justice White's dissenting opinion. *Id.*

[197] *Id.*

[198] *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)).

capricious as the death sentences invalidated in *Furman v. Georgia*,[199] and, therefore, constitutes cruel and unusual punishment in violation of the eighth amendment.[200]

IV. CONCLUSION

The *Harmelin* decision makes quite evident that the United States Supreme Court has failed in its pursuit to provide lower courts with guidance in an area where instruction has been desperately needed and anxiously awaited. In the decade prior to the *Harmelin* decision, the Supreme Court had firmly established that eighth amendment proportionality review of noncapital sentences should be rare,[201] but has provided insufficient guidance as to the method of determining its applicable circumstances.[202] The *Solem* tripartite proportionality analysis, although somewhat helpful, has, nonetheless, generated much confusion.[203] As a result of distinguishing *Rummel* and *Davis* from the facts in *Solem*, the *Solem* Court could only characterize the three-part proportionality test as a permissive analysis.[204] Consequently, lower courts, uncertain as to how to reconcile or prioritize the holdings in *Rummel*, *Davis* and *Solem*, have applied the proportionality principle inconsistently in noncapital cases.[205]

The Supreme Court's recent pronouncement in *Harmelin* epitomizes the confusion with the issue of proportionality in that the Court sets forth three entirely different approaches for confronting the issue. The dissent reaffirms the *Solem* decision and the existence of a generalized

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[199] *Id.* (citing 408 U.S. 238 (1922)). Justice Stevens recognized that, in order to justify a sentence such as Harmelin's which does not serve any rehabilitative function, the crime committed must be "'so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'" *Id.* (quoting *Furman*, 408 U.S. at 307 (Stewart, J., concurring)). In this case, the Justice asserted, the petitioner's crime, although serious, cannot be characterized as such. *Id.* at 2719-20.

[200] *Id.* at 2720 (Stevens, J., dissenting).

[201] *See Hutto v. Davis*, 454 U.S. 370, 374 n.3 (1982) (per curiam) (The Supreme Court admitted that in certain cases a proportionality review of noncapital cases may be acceptable.); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (The Supreme Court recognized that in rare cases proportionality challenges to terms of years are permissible under the eighth amendment.). *See also Solem v. Helm*, 463 U.S. 277 (1983).

[202] *See supra* notes 98-99 & 104 and accompanying text; *see also supra* note 117.

[203] *See generally supra* note 7.

[204] *See supra* notes 118-23 and accompanying text.

[205] *See supra* note 7.

proportionality guarantee,[206] but does not provide lower courts with any further guidance regarding the application of *Rummel*, *Davis*, and *Solem*. Conversely, Justice Scalia and Chief Justice Rehnquist ignore stare decisis by discarding any notion of a generalized proportionality guarantee which exists in the Court's eighth amendment precedent, particularly capital jurisprudence.[207] The concurrence, taking a middle stance, recognizes a narrow proportionality principle embodied in the eighth amendment,[208] but insists on applying the *Solem* tripartite analysis in a peculiar fashion. Deeming the application of the second and third *Solem* factors unnecessary in most cases,[209] Justice Kennedy utilized the first *Solem* prong alone to determine whether a rational basis existed for the enactment of the legislation under which Harmelin was sentenced. Accordingly, the Justice assessed whether the petitioner's sentence was constitutionally proportional under the eighth amendment.[210]

Unfortunately, none of these approaches can be relied upon by lower courts as the basis of the Supreme Court's determination that Harmelin's sentence was constitutional.[211] *Harmelin* stands solely for the proposition that the specific statutory sentence of life imprisonment without parole for the crime of possessing 672.5 grams of cocaine by a first-time drug offender cannot be considered disproportional under the eighth amendment.[212] The Supreme Court, therefore, has failed to instruct lower courts as to whether *Solem* should be applied exclusively or, instead, be placed on equal footing with *Rummel* and *Davis*. Thus, the much-awaited *Harmelin* decision does absolutely nothing to eliminate the confusion which exists with respect to the scope of the eighth amendment proportionality guarantee.

In fact, lower courts are now in a worse position as a result of the *Harmelin* decision. By limiting *Harmelin* to its facts, the Supreme Court

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[206] *See supra* notes 168-91 and accompanying text.

[207] *See supra* note 149-53 and accompanying text.

[208] *See supra* note 157 and accompanying text.

[209] *See supra* notes 163-65.

[210] *See supra* note 162 and accompanying text. Justice Kennedy's approach was permissible given that the language in *Solem* explicitly states that the application of all three factors are unnecessary and that no one factor is dispositive in determining the issue of proportionality. *See* Solem v. Helm, 463 U.S. 277, 290-92 (1983).

[211] This is so because the concurrence solely agreed with the *judgment* which Justice Scalia reached in Parts I-IV of the opinion. *See supra* notes 155-67 and accompanying text.

[212] Harmelin v. Michigan, 111 S. Ct. 2680 (1991).

has not only failed to provide lower courts with much needed direction, but has added another holding to the two which already must be deciphered with respect to *Solem*. Additionally, the *Harmelin* decision will create increased disparity in the application of the eighth amendment proportionality guarantee. In view of Justice Kennedy's concurring opinion,[213] much uncertainty will now arise when lower courts substantively apply the *Solem* tripartite analysis. Although many courts will continue to apply all three of the *Solem* factors when reviewing noncapital sentences that are challenged under the eighth amendment, certain courts will inevitably follow Justice Kennedy's approach and engage in a rational basis test, utilizing the first *Solem* prong alone to assess proportionality. Furthermore, given that sentences may be validated with greater ease under Justice Kennedy's "rational basis" analysis, a reviewing court's choice regarding the way to apply the *Solem* analysis may ultimately depend on the result the court hopes to achieve.

In view of the Supreme Court's deeply divided response in upholding the constitutionality of Harmelin's sentence, it is quite probable that the Court will reexamine the eighth amendment proportionality issue in the near future. Given the increased conservatism of the United States Supreme Court, the next assessment of the cruel and unusual punishment clause is likely to result in the Court's adoption of Justice Scalia's reasoning in *Harmelin*.[214] In contemplating a reversal of *Solem*, the question arises whether the Supreme Court will again acknowledge those "rare" occasions which require a proportionality review of a noncapital sentence.[215] Such recognition would afford a future moderate Court the opportunity to utilize the caveat as the *Solem* Court did,[216] and inevitably lead the Supreme Court full circle to reencounter the exact issue that the *Harmelin* Court failed to resolve.

A generalized proportionality principle must continue to be

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[213] *See supra* notes 208-10.

[214] For a discussion of Justice Scalia's declaration that the *Solem* decision must be overturned, see *supra* notes 149-53 and accompanying text.

[215] Despite the Court's effort to abandon a generalized proportionality guarantee, the Supreme Court has conceded to the existence of these rare exceptions—absent any guidance regarding the method of determining the existence of these rare cases—in both *Rummel* and *Davis*. *See Hutto v. Davis*, 454 U.S. 370, 374 n.3 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

[216] The *Solem* Court utilized those "rare" occasions recognized in *Rummel* and *Davis* in order to demonstrate the Supreme Court's previous acknowledgment of a generalized proportionality principle, albeit rare, in eighth amendment jurisprudence. *See supra* notes 115-17 and accompanying text.

recognized in the eighth amendment cruel and unusual punishment clause in order to prevent legislatures from exercising unbridled discretion in setting extremely severe and unwarranted prison terms. Moreover, a refusal to recognize an eighth amendment proportionality guarantee blatantly ignores much well-established Supreme Court precedent.[217] Critics of the proportionality principle, however, express concerns regarding the judiciary's ability to objectively assess the proportionality of noncapital sentences and, therefore, maintain that penal judgments, such as the appropriate length of prison terms, must rest solely within the discretion of the legislature.[218] Regardless of the position taken, the United States Supreme Court must take a firm stance on this issue. Moreover, given the Supreme Court's adoption of a generalized eighth amendment proportionality guarantee, the Court must set forth a straightforward standard for uniformly assessing proportionality of all challenged sentences. By refusing to do so thus far, the Supreme Court has obfuscated the issue and, with the holding in *Harmelin*, has sent lower courts further into a myriad of speculation regarding the eighth amendment proportionality principle.

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[217] As early as 1910, the Supreme Court in *Weems* expressly recognized the need for proportionality in all punishments. *See supra* notes 41-53 and accompanying text. In capital jurisprudence, the Court has recognized a generalized proportionality principle as well, given the absence of any language which might limit the scope of the principle solely to capital cases. *See supra* notes 64-82 and accompanying text. Recently, the Court has reaffirmed the existence of a generalized eighth amendment proportionality guarantee in its noncapital jurisprudence. *See supra* note 201.

[218] See supra note 148.